Petition

81-1884

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1981

JAMES GEORGE STAFOS,
Petitioner,

vs.

ROBERT D. BELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM O. ISENHOUR, JR.
(Counsel of Record)
6005 Martway, Suite 108
Mission, Kansas 66202
(913) 384-4800
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

Is an unconscionable delay of over seven years between commencement of a bankruptcy case and trial of the issue of discharge, such a departure from the accepted and usual course of judicial proceedings, as to entitle the bankrupt to a general discharge?

Is the denial of the discharge to the bankrupt in this case such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James George Stafos, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on December 16, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 666 F. 2d 1343, and is printed in Appendix A hereto, *infra*, page A1. The Memorandum and Order of the United States District Court for the District of Kansas is printed in Appendix A hereto, *infra*, page A11. The Memorandum Opinion of the United States District Court for the District of Kansas, Bankruptcy Division, is printed in Appendix A hereto, *infra*, page A24.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Appendix A, *infra*, page A1) was entered on December 16, 1981. A timely petition for rehearing and for rehearing in banc was denied on January 29, 1982 (Appendix A, *infra*, page A10). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE AND RULES INVOLVED

The statute involved is 11 U.S.C. Section 32c(3), which provides:

> "The court shall grant the discharge unless satisfied that the bankrupt has * * * (3) while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation; * * *."

Also pertinent is Bankruptcy Rule 903:

> "These rules shall be construed to secure the expeditious and economical administration of every bankrupt estate and the just, speedy, and inexpensive determination of every proceeding in bankruptcy."

Also involved is Bankruptcy Rule 704(a) which provides:

> (a) Summons and Notice of Trial or Pre-Trial Conference: Issuance and Form; Service with Complaint.

Upon the commencement of an adversary proceeding the bankruptcy judge shall set a date either for trial or for a pre-trial conference and shall forthwith issue a summons and notice of trial or pre-trial conference. The summons and notice shall conform substantially to Official Form No. 26 and shall be served together with the complaint on the defendant in one of the modes authorized by this rule."

STATEMENT OF CASE

On December 24, 1970, petitioner filed his Voluntary Bankruptcy Petition together with Schedules and Statement of Affairs in the United States District Court for the District of Kansas, Bankruptcy Division. Robert D. Bell, a judgment creditor of petitioner, filed his "Specifications of Objections to Discharge" on August 20, 1971, which were amended on December 6, 1971 and again on January 24, 1975. Pre-trial conferences were held on these issues on January 6, 1975, October 12, 1976, and June 15, 1977. The objections to discharge were not tried to the Bankruptcy Judge until September 13-15, 1977. Post-trial briefs were filed and the matter submitted to the Bankruptcy Judge on October 20, 1977. Not until January 23, 1979 did the Bankruptcy Judge decide the case, denying a discharge by his Memorandum Opinion entered on that date. An appeal to the District Court followed. By Memorandum and Order of October 17, 1979, the District Judge affirmed in part and denied in part the Bankruptcy Judge's decision. Appeal to the United States Court of Appeals for the Tenth Circuit followed. That court affirmed the lower courts' decisions denying the discharge on December 16, 1981.

The denial of discharge was based on a finding that petitioner had obtained credit from Robert D. Bell by pub-

lishing a "materially false statement" in the Produce Reporter Company's *Blue Book*. The statement in question was a 1966 year-end financial statement prepared by petitioner's certified public accountants and submitted to the Produce Reporter Company which then ascertained and published a financial rating for petitioner's business. The lower courts found the aforesaid financial statement to be "materially false" because it was at variance with petitioner's 1966 income tax return which was also prepared by petitioner's certified public accountants.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction of this case in the United States District Court for the District of Kansas, Bankruptcy Division was based upon the Bankruptcy Act of 1898, 11 U.S.C. Section 1, *et seq.*

REASONS FOR GRANTING WRIT

I

Petitioner respectfully submits that the unconscionable and nightmarish delays which have been allowed to occur in the courts below violate all traditional concepts of fair play and have totally frustrated the purposes of the Bankruptcy Act.

Specifically, the record in this case discloses:

1. Eight (8) months elapsed between commencement of the case and filing of any objections to discharge;

2. Over four (4) years elapsed before a pre-trial conference was held;

3. Over four (4) years elapsed before the filing of the amended objections that petitioner had to defend against;

4. Over six (6) years elapsed before discovery was closed;

5. Nearly seven (7) years elapsed before trial was commenced;

6. Eight (8) years elapsed before the discharge issue was resolved;

7. The case was only a few days from its eleventh anniversary before disposition by the Court of Appeals.

Petitioner suggests that such a record is repugnant to the concepts of the Federal Rules of Civil Procedure and the Bankruptcy Rules, calling for "the just, speedy and inexpensive determination of every proceeding in bankruptcy." Bankruptcy Rule 903; see also F. R. Civ. P., Rule 1. The Advisory Committee's Note to Bankruptcy Rule 903 states:

> "The objective of 'expeditious and economical administration' of bankrupt estates has frequently been recognized by the courts to be 'a chief purpose of the bankruptcy laws.' See *Katchen v. Landy*, 382 U.S. 323, 328 (1966); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 346-47 (1874); *Ex parte Christy*, 44 U.S. (3 How.) 292, 312-14, 320-22 (1845). * * *"

Bankruptcy Rule 704(a), *supra*, requires that, upon the commencement of every adversary proceeding, the Judge *shall* set a date for trial or pre-trial. The reason for this mandate is found in Advisory Committee's Note to Rule 704(a):

> "Designation of the date of trial in advance serves an important objective of bankruptcy procedure. As the

Supreme Court observed in *Katchen v. Landy*, 382 U.S. 323, 328 (1966),

> 'this Court has long recognized that a chief purpose of the bankruptcy laws is
>
> > 'to secure a *prompt* and effectual administration and settlement of the estate of all bankrupts *within a limited period*'
>
> "Provision for disposition *without the delay* that is the usual incident of conventional litigation is one of the means chosen to effectuate that purpose. *Id.* at 329." (Emphasis added).

Petitioner submits that the very nature of bankruptcy proceedings and the "fresh start" philosophy underlying the act, demands an early disposition of such cases. To sanction the horrendous delay that occurred in this case is to leave the bankrupt in limbo for more than a decade, not knowing whether he will have a fresh start or if he will be held accountable for debts to all his creditors that may have been long forgotten. And in this case, a man of 51 years (petitioner's age at the commencement of this case) could have envisioned the hope of a fresh start; that same hope and vision is unrealistic for a man of 62 years (his present age), even if the discharge is granted at this late date. The ancient maxim, "justice delayed is justice denied" could apply to no better case than the case at bar.

Nor did the Court of Appeals accept the challenge of correcting this deviation from the accepted and usual course of judicial proceedings that occurred in the Bankruptcy Court.

The Court of Appeals gave lip service to its own rule, enunciated in *Wolfe v. Tri-State Insurance Co.*, 407 F. 2d 16 (10th Cir. 1969). The delay between case commencement

and trial in *Wolfe* was over six years and the Court of Appeals in that case refused to condone what it termed an "unconscionable delay." The Court eloquently denounced the delay and enunciated the public policy issues as follows:

> "Finally the unconscionable delay of over five years clearly violated Order 32 of General Orders in Bankruptcy, 11 U.S.C. page 2013, which directs that a time should be fixed for objections to a discharge; and the courts have held that the bankrupt is entitled to prompt hearings on applications for a discharge, and that the judge will hear the matter at the 'earliest opportunity'. *In re Karp*, 11 F. Supp. 129 (D. C. Conn. 1935). The record is silent as to reasons why there was no earlier opportunity for the judge to hear this matter. The objecting creditors offer no explanation for this delay. The *bankrupts should not be made to answer for it.*
>
> "We want to emphasize the injustice of this unseemly delay. In this way *the whole purpose of the Bankruptcy Act is clearly frustrated.* The primary purpose of this Act is to give an unfortunate businessman, who had failed, a chance to start anew, a chance to profit by his own mistakes. Otherwise, he could hardly engage in business at all. The bankrupt may have, and usually has made mistakes. Mistakes are inevitable, but may be corrected, and knowledge gained thereby.
>
> "* * *
>
> "The very nature of bankruptcy legislation calls for action within a reasonable time and usually there is early action. But to allow the creditors five separate continuances covering more than a year before they

> even filed their objections; and then have another five years elapse before a hearing is scheduled on the objections, during which time it would be most difficult for any bankrupt to start or operate any kind of a business, *is beyond the range of reason*, that is, unless there is a satisfactory explanation, which is entirely absent from this record. The delay is even more tragic when young men are thus stymied." (Emphasis added). (407 F. 2d at 20).

In the case at bar, the Court of Appeals sought to distinguish *Wolfe*, saying that petitioner, "Stafos himself caused much of the delay." Petitioner emphatically and vigorously denies this conclusion and submits it is without support in the record. The Bankruptcy Judge made no findings of fact on the delay issue; he did not even mention it in his opinion. The District Judge made no specific findings, concluding only that the case moved "at a snail's pace" and that the "case progressed slowly."

The Court of Appeals in sanctioning the long delay cited four reasons:

1. An unrelated appeal on a homestead exemption issue;

2. Petitioner's "recalcitrance in providing records";

3. Motions filed by petitioner's then attorneys to delay trial;

4. A change in bankruptcy judges.

Petitioner submits that none of these findings of fact by the Court of Appeals are supported by the record. Specifically:

1. The homestead appeal may have caused delay in closing the estate, but offers no explanation as to

why the instant issues could not have been tried earlier; also, the homestead appeal was concluded in January, 1974 and this case was not tried for another three years and nine months;

2. The records production issue was resolved in *petitioner's* favor by the Bankruptcy Judge and not appealed. No sanctions were sought nor contempt proceedings pursued because of this "recalcitrance";

3. Motions for continuance were two in number, the first filed in April, 1975 (the case was already over four years old then) and the second in October, 1975, seeking a continuance of only two months;

4. Nor did the change in judges explain more than a minute fraction of the delay. The vacancy in this position existed only from November, 1975 to January or February, 1976. Further, an interim judge from another district served by special assignment so that there was never a time when there was *no* judge available.

Petitioner has waited eleven (11) years for a judicial explanation as to why his case took seven (7) years to get to trial. The Bankruptcy Judge ignored the issue altogether. The District Judge mentioned reasons only in passing. And finally, the first judicial attempt to explain the delay by the Court of Appeals is not supported by the record.

The responsibility does not lie with petitioner to explain this delay. By the Bankruptcy Rules and public policy as enunciated by this Court, the Bankruptcy Judge has the responsibility to control his docket, to set cases for pre-trial and trial and to accomplish *expeditious* and economical administration of justice. When he deviated

so grossly from this standard, the Court of Appeals was obligated to correct this error, not sanction it.

The question raised in *Wolfe* and in this case has not, to petitioner's knowledge, been addressed by any other circuit nor by this court. Petitioner submits, however, that if the general principles of "expeditious and economical administration" and "just, speedy, and inexpensive determination" commanded by the Bankruptcy Rules are to have any meaning, this issue should be settled by this Court. Further, the case at bar would seem to be an anomoly in an era of concentration upon the more efficient and expeditious disposition of cases presented to American courts.

II

Petitioner submits that the denial of the discharge pursuant to 11 U.S.C. Section 32c(3) is also the result of fundamental injustices.

It is well settled that the objecting creditor carries the burden of proof in these proceedings (Bankruptcy Rule 407). The lower courts in this case concluded that the financial statement in question was a "materially false statement" although no explanation was given as to *how* the statement was false. Apparently the lower courts acted on the assumption that because the statement was different from petitioner's tax return that the statement had to be false. Petitioner submits that though the two documents contain differences that both are accurate and neither is false. The reason such a difference is explainable relates to generally accepted accounting principles. The subject financial statement, as customary, was obviously prepared on an *accrual basis*. The individual tax return, as is customary and required by law, was done on a *cash basis*.

Thus, the statement, if prepared on an accrual basis (very likely, since both documents were prepared within days of each other by a very reputable C.P.A. firm), it could be expected to differ substantially from the tax return, at least in terms of raw numbers.

The importance of considering this analysis of the financial statement and tax return is to show that it is just as likely that the C.P.A. correctly prepared the statement as to infer and assume that a well-known and highly reputable C.P.A. firm intentionally prepared a false statement. The net effect is to place the burden of proof on petitioner to establish the validity of both documents, a result totally unwarranted under existing law.

Moreover, the result of the lower courts' decisions is to deny petitioner, an ordinary farmer, the right to rely on his Certified Public Accountant, and imposes upon him the duty to "check over" the work of the C.P.A., determine if it is accurate, and if not, withdraw and correct the work. Such a practice defies credibility in the modern business world, and, in addition, shifts the burden of proof to petitioner in total disregard of applicable law.

Petitioner submits that for the lower courts to grant the most damaging relief possible against him - denial of general discharge - based upon mere supposition, speculation and surmise, and because petitioner did not testify or produce some evidence, is such a deviation from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

WILLIAM O. ISENHOUR, JR.
6005 Martway, Suite 108
Mission, Kansas 66202
(913) 384-4800
Attorney for Petitioner

Appendix

APPENDIX

APPENDIX A

(Filed December 16, 1981)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 79-2269
80-1033

IN THE MATTER OF:
JAMES GEORGE STAFOS,
Bankrupt.

ROBERT D. BELL,
Plaintiff-Appellee and
Cross-Appellant,

v.

JAMES GEORGE STAFOS,
Defendant-Appellant and
Cross-Appellee.

Appeal From the United States District Court
for the District of Kansas
(D.C. No. 79-2090)

William O. Isenhour, Jr. (James L. Eisenbrandt with him on the brief) of Soden, Eisenbrandt, Isenhour & Gates, Mission, Kansas, for Defendant-Appellant and Cross-Appellee.

Harley E. Venters of Oklahoma City, Oklahoma (John J. Ziegelmeyer of Kansas City, Kansas, with him on the brief), for Plaintiff-Appellee and Cross-Appellant.

Before DOYLE and SEYMOUR, Circuit Judges, and BOHANON,* Senior District Judge.

SEYMOUR, Circuit Judge.

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*Honorable Luther Bohanon, Senior Judge for the Northern, Eastern, and Western Districts of Oklahoma, sitting by designation.

This appeal is from a judgment of the district court affirming a bankruptcy judge's order denying a discharge in bankruptcy to James George Stafos. The bankruptcy court denied discharge to Stafos pursuant to 11 U.S.C. §§ 32(c)(1) and 32(c)(3).[1] On appeal, the district court: (1) affirmed the denial of discharge under 11 U.S.C. § 32(c)(3); (2) found that the delay in the proceedings did not require that Stafos be allowed discharge; and (3) reversed the denial of discharge based on 11 U.S.C. § 32(c)(1). Stafos argues that the district court erred because the denial of discharge under 11 U.S.C § 32(c)(3) was unwarranted and the excessive delay in the bankruptcy proceedings requires discharge. We disagree with Stafos

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1. The Bankruptcy Act of 1898 was repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, sec. 401, 92 Stat. 2682, generally effective October 1, 1979. *Id.* sec. 402. Stafos filed his voluntary petition for bankruptcy on December 24, 1970, Bell filed objections to discharge in 1971, and judgment was rendered in these adversary proceedings on January 23, 1979. Thus, this case is governed by the old Act. *See id.* sec. 403, 92 Stat. 2683.

and affirm the denial of discharge pursuant to 11 U.S.C. § 32(c)(3).[2]

Stafos was a produce dealer registered under the Perishable Agricultural Commodities Act of 1930. With a transmittal letter dated February 15, 1967, Stafos furnished, through his accountant, a written financial statement to Produce Reporter Company, a credit agency for the fresh fruit and vegetable industry. The statement claimed a net worth for James G. Stafos Produce of $95,960.64 as of December 31, 1966, and a net profit of $46,598.85 for the year January 1, 1966 to December 31, 1966. Based on the financial statement, Produce Reporter Company gave Stafos a "credit worth financial responsibility" rating in excess of $50,000.00, which was published in the 1967 Spring Blue Book. However, Stafos' individual federal and state income tax returns for 1966 showed a net loss of $9,442.70 for James Stafos Produce.

Robert Bell was also a licensed produce dealer. He testified that he relied on Stafos' Blue Book credit rating when he furnished credit to Stafos in 1967 for the purchase of watermelons and cantaloupes. Stafos did not pay for the produce. Bell testified that he would not have extended credit to Stafos except for the credit rating in the Blue Book.

After a hearing in 1968, the Department of Agriculture ordered Stafos to pay Bell reparations. The order was later reduced to judgment against Stafos in a United States District Court on December 11, 1970. On Decem-

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2. The party objecting to discharge in bankruptcy, Robert Bell, has cross appealed from the judgment of the district court insofar as it reversed the bankruptcy judge's denial of discharge to Stafos under 11 U.S.C. § 32(c)(1). Because we independently affirm the denial of discharge in bankruptcy under 11 U.S.C. § 32(c)(3), we need not decide whether Stafos should be denied discharge under 11 U.S.C. § 32(c)(1).

ber 24, 1970, Stafos filed a voluntary petition in bankruptcy. On August 8, 1971, Bell filed objections to a discharge in bankruptcy. In January 1975, the bankruptcy court ordered Bell to file amended objections. Trial on the objections to discharge was held in 1977. The bankruptcy court denied discharge to Stafos on January 23, 1979.

I.

Denial of Discharge to Stafos Under 11 U.S.C. § 32(c)(3)

The standard of review for bankruptcy matters, "both at the district court and court of appeals level, is whether the findings of the bankruptcy judge are clearly erroneous." *In re White House Decorating Co. v. Eckles,* 607 F.2d 907, 910 (10th Cir. 1979). It is only the findings of the bankruptcy judge, not findings of the district court, which are binding upon the court of appeals unless clearly erroneous. *Girsh v. Katchen,* 382 F.2d 560, 561 (10th Cir. 1967).

One circumstance in which discharge in bankruptcy should be denied is found in 11 U.S.C. § 32(c)(3):

> "(c) The court shall grant the discharge unless satisfied that the bankrupt has . . . (3) while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation . . . ."

To successfully object to another's discharge in bankruptcy under section 32(c)(3), a litigant must establish the five elements enumerated in *Wolfe v. Tri-State Insurance Co.*, 407 F.2d 16, 18-19 (10th Cir. 1969):

> "To preclude discharge under this section, the objector must show these elements: (1) a written statement, (2) materially false as to financial condition, (3) the falsity of which the bankrupt knows, (4) by the use of which statement property must be obtained or credit extended, and (5) the creditor must have relied upon the statement."

(Citation omitted). Stafos contends that the last four of these elements were not established and that the related findings of the bankruptcy judge are clearly erroneous.

Stafos first argues that the February 1967 financial report submitted for a credit rating in the "Blue Book" was not materially false because (1) neither the district court nor the bankruptcy judge explained why it was false, (2) Bell produced no expert testimony showing it to be "materially false," and (3) no evidence was produced showing the tax return was correct. However, the February financial statement showed a net profit of James G. Stafos Produce for the year 1966 of $46,598.85, with a net worth of over $95,000.00, at the same time that Stafos' 1966 individual income tax return showed a net loss of James G. Stafos Produce of $9,442.70. Tax returns are required reports, certified as accurate by the taxpayer under penalty of perjury. In the absence of any evidence of inaccuracy, the bankruptcy judge was justified in finding that Stafos' 1966 tax return was correct and that the February 1967 statement submitted to the Blue Book was false. The submission of a false statement showing a comfortable profit instead of an actual loss is material when its purpose is to obtain a good credit rating.

Stafos next argues that his knowledge of the false February 1967 financial statement was never shown by Bell. However, there is adequate evidence in the record to support the finding that Stafos was aware of the February 1967 statement. Stafos filed a pleading in response to a request for admissions and admitted his signature to the February 1967 financial statement, although this admission was later disputed by one of Stafos' witnesses who claimed that Stafos' accountant, George Sinderson, signed the 1967 financial statement. Even if Stafos' witness was correct, the letter of transmittal noted that the February 1967 financial statement was furnished at the request of Stafos. Furthermore, the evidence also shows Stafos received a copy of the February 1967 financial statement and letter of transmittal. Therefore, the record adequately supports the inference that Stafos knew of the false statement.[3]

Stafos further argues that the fourth and fifth elements of the *Wolfe* test for 11 U.S.C. § 32(c)(3) were

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3. To support the contention he did not know of the 1967 financial statement, Stafos also relies upon *Wolfe v. Tri-State Insurance Co.*, 407 F.2d 16 (10th Cir. 1969), a case in which the bankrupts were deemed unaware of a false financial statement under 11 U.S.C. § 32(c)(3). The court in *Wolfe* found that the bankrupts justifiably relied upon the statement their C.P.A. prepared and thus granted them discharge in bankruptcy.

The instant case differs from *Wolfe*. In *Wolfe* the one financial statement made by the C.P.A. was *certified* by the C.P.A. and evidence indicated: (1) bankrupts were uneducated and unsophisticated, (2) they testified they gave no instruction to the C.P.A. other than to prepare a correct financial statement, (3) they relied upon the C.P.A., and (4) the C.P.A. gave the statement to the bank without instruction on the part of the bankrupts. In the instant case, neither Stafos nor the C.P.A. testified at trial. Stafos' C.P.A. prepared one financial statement for tax purposes *which Stafos certified* and a materially different financial statement for credit rating purposes, unaudited. A permissible inference from these circumstances and the other evidence discussed above is that Stafos knew of the materially false financial statement and that it was prepared at his request. *See In re Gerald A. Mascolo*, 505 F.2d 274, 276-77 (1st Cir. 1974).

not established because the evidence was not sufficient to show that credit was extended to him, or that Bell relied upon the credit rating. However, the record contains adequate evidence to the contrary. On direct examination, the following exchange took place:

> "(Q) (By Mr. Venters) Now, Mr. Bell, would you have made the arrangement [consignment] with Mr. Stafos, except for his rating that appeared in the blue book in April of 1967, and your conversations with him in Kansas City in May of 1967, in reference to his financial stability?
>
> . . . .
>
> "(A) [Mr. Bell] No, I would not have."

Rec., vol. VII, at 88. Although other matters may have also entered into Bell's extension of credit to Stafos, "it is not essential that the financial statement be the sole cause for advancement of credit, [for] partial reliance is sufficient." *Rogers v. Gardner*, 226 F.2d 864, 867 (9th Cir. 1955) (interpreting 11 U.S.C. § 32(c)(3)).

Upon reviewing the record, we are not left with the " 'definite and firm conviction that a mistake has been committed' " in the bankruptcy judge's findings concerning 11 U.S.C. § 32(c)(3). *In re McGinnis*, 586 F.2d 162, 164 (10th Cir. 1978) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). We affirm the district court decision denying Stafos' discharge in bankruptcy under 11 U.S.C. § 32(c)(3).

II.

There Was No Unconscionable Delay Requiring That Stafos Be Discharged

Stafos also relies upon *Wolfe v. Tri-State Insurance Co.*, 407 F.2d at 20, to argue that the long delay from his

filing for bankruptcy in December 1970 to the bankruptcy court's denial of discharge in January 1979 entitles him to discharge on unconscionability grounds. In *Wolfe*, the court said:

> "Finally the unconscionable delay of over 5 years clearly violated Order 32 of General Orders in Bankruptcy, 11 U.S.C. page 2013, which directs that a time should be fixed for objections to a discharge; and the courts have held that the bankrupt is entitled to prompt hearings on application for a discharge, and that the judge will hear the matter at the 'earliest opportunity.' In re Karp, 11 F.Supp. 129 (D.C.Conn. 1935). The record is silent as to the reasons why there was no earlier opportunity for the judge to hear this matter. The objecting creditors offer no explanation for this delay. The bankrupts should not be made to answer for it."

Id. (footnote omitted). Importantly, Stafos does not dwell upon the language in *Wolfe* which also points out that "[t]he very nature of bankruptcy legislation calls for action within a reasonable time . . . *unless there is a satisfactory explanation* . . . ." *Id.* (emphasis added). In *Wolfe* "[t]he objecting creditors offered no explanation for [the] delay," and the court found that a "satisfactory explanation" was "entirely absent from [the] record." *Id.*

As distinguished from the *Wolfe* case, Stafos himself caused much of the delay. For example, Stafos appealed a homestead exemption issue to the district court, Tenth Circuit, and the Supreme Court, which denied *certiorari* in 1973. *Stafos v. Jarvis*, 477 F.2d 369 (10th Cir.), *cert. denied*, 414 U.S. 944 (1973). The record also indicates that delay resulted in part from Stafos' recalcitrance in providing records and from motions filed by his attorneys to delay

trial, as well as a change in bankruptcy judges. Although some types of delay may be unconscionable and entitle a person to discharge, the circumstances in the instant case do not warrant such a result.

Accordingly, the district court order denying discharge in bankruptcy to Stafos under 11 U.S.C. § 32(c)(3) is affirmed.

NOVEMBER TERM - January 29, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Luther L. Bohanon, District Judge.*

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*Of the United States District Court for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

Nos. 79-2669
and 80-1033

IN THE MATTER OF:
JAMES GEORGE STAFOS,
Bankrupt,

ROBERT D. BELL,
Plaintiff-Appellant,

v.

JAMES GEORGE STAFOS,
Defendant-Appellee.

This matter comes on for consideration of appellant, cross-appellee's petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Howard K. Phillips, Clerk
By /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

(Filed October 17, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BANKRUPTCY No. 21239-B-4
CIVIL ACTION No. 79-2090

In the Matter of:

JAMES GEORGE STAFOS,
Bankrupt,

ROBERT D. BELL,
Plaintiff,

v.

JAMES GEORGE STAFOS,
Defendant.

MEMORANDUM AND ORDER

This is an appeal from the Bankruptcy Judge's denial of discharge in bankruptcy. A hearing was held on September 20, 1979. Some background information is necessary for an understanding of the issues on appeal.

James Stafos was a produce dealer registered under the Perishable Agricultural Commodities Act of 1930. Robert Bell was in the wholesale produce business and sold cantaloupes and watermelons to Stafos in 1967. Bell was not paid. After a hearing in October 1968, the Department of Agriculture ordered Stafos to pay reparations of approximately $130,000.00 to Bell. This order was translated

into a judgment against Stafos in the United States District Court on December 11, 1970.

On December 24, 1970, Stafos filed a voluntary petition in bankruptcy. March 20, 1971, was set as the deadline for filing objections to discharge. That date was extended twice and finally set at August 8, 1971. At that time, Bell filed an objection to discharge. The grounds for denial of discharge are set out at 11 U.S.C. §32(c):

> (c) The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under section 152 of Title 18; or (2) destroyed, multilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title; or (6) in the course of a proceeding under

> this title refused to obey any lawful order of, or to answer any material question approved by, the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

The objection to discharge was based on six grounds: (1) False oaths and accounts in the bankrupt's statement—specifically in questions 2.c and 10.a of the statement of affairs, in the statement that the bankrupt had not engaged in business since September 18, 1969, in the fradulent listing of indebtedness more than once, and in the listing of false accounts; (2) Concealing property belonging to the estate, including trucks and other equipment; (3) Failing to keep and preserve books of accounts and financial records, concealing records, and refusing to comply with court orders to furnish certain records; (4) Knowingly giving false statements of financial condition to the Produce Reporter Company in order to obtain credit; (5) Failing to furnish information and records as ordered by the court; (6) Failing to account for losses and discrepancies in assets as shown by the bankrupt's tax records and those in his schedules.

The case progressed slowly. The record shows delays attributable to all parties and to a change of Bankruptcy Judges. An appeal on a homestead question was taken to the District Court, Tenth Circuit, and the Supreme Court which denied certiorari in 1974. In January 1975,

the Bankruptcy Court ordered Bell to file amended objections. The objections were made more specific and a claim under 11 U.S.C. §35(a)(2) was added. Trial on the objection to discharge was held on September 13-15, 1977. The decision denying discharge was entered January 23, 1979, and this appeal was taken.

The Bankruptcy Judge found that discharge should be denied because Stafos had (1) knowingly and fraudulently made a false oath or account in the statement of affairs, and (2) had obtained credit by publishing a materially false statement respecting his financial condition. The judge found that there was no fraudulent concealment of or failure to preserve records. He found also that Bell had failed to sustain the burden of proof as to his claims under 11 U.S.C. §32(c)(4) and (6) and dismissed these claims. As to the objection based on 11 U.S.C. §32(c)(7), he held that there was insufficient evidence to warrant denying discharge. The claim under 11 U.S.C. §35(a)(2) was held untimely filed and was dismissed.

Both parties agree that the scope of review is as set out in *In re Werth*, 443 F.Supp. 738, 739 (D.Kan. 1977):

> Under Bankruptcy Rule 810, 11 U.S.C., and the applicable decisions of the federal courts, the scope of review by this Court of the Referee's report and order is narrow. The Court is bound to accept the Referee's findings of fact unless they are clearly erroneous. See, *e.g., Moran Brothers, Inc. v. Yinger*, 323 F.2d 699 (10th Cir. 1963); *Washington v. Houston Lumber Co.*, 310 F.2d 881 (10th Cir. 1962). The clearly erroneous rule does not apply, however, to questions of law or to mixed questions of fact and law, and the Referee's findings in these matters cannot be approved without this Court's independent determination of the law.

Stafos v. Jarvis, 477 F.2d 369 (10th Cir. 1973), *cert. denied* 414 U.S. 944, 94 S.Ct. 230, 38 L.Ed.2d 168 (1973).

There is also agreement that a person objecting to discharge must prove at least one of the acts enumerated in 11 U.S.C. §32(c) by a preponderance of the evidence. Stafos seeks reversal of the Bankruptcy Judge's decision on two grounds: prejudicial delay in the proceedings and Bell's failure to sustain his burden of proof.

Stafos argues that discharge should have been granted because of the unconscionable delay in the proceedings. The bankruptcy statutes and rules clearly contemplate the expeditious handling of cases. It is also clear that this case has proceeded at a snail's pace. We, however, have found no authority for the proposition that a bankrupt who could otherwise be denied a discharge under 11 U.S.C. §32(c) must be granted a discharge because of excessive delays. The case upon which Stafos relies is *Wolfe v. Tri-State Insurance Co.*, 407 F.2d 16 (10th Cir. 1969). In that case, an objection was made under 11 U.S.C. §32(c)(3) —obtaining credit by false statements. To preclude discharge under that subsection, the objector must show (1) a written statement, (2) materially false as to financial condition, (3) the falsity of which the bankrupt knows, (4) by the use of which statement property must be obtained or credit extended, and (5) the creditor must have relied upon the statement. The Referee found that there was no evidence of intent to defraud (the bankrupts had justifiably relied upon their accountants to make a correct statement) and no reliance and therefore the Referee granted discharge. The District Court reversed, apparently in summary fashion, and the Tenth Circuit found that that was error:

> We find no cogent reasons appearing in the record to reject the findings of the Referee. The Referee was justified in overruling the objection from the creditors when the testimony of the banker showed there was insufficient reliance by the bank upon the financial statement, and especially since the testimony of the bankrupts showed there was insufficient knowledge on their part. Therefore, the Referee's findings were not clearly erroneous when he granted discharge after hearing this testimony. It was error for the reviewing judge to summarily reject the findings of the Referee. *Id.* at 20.

The court went on however, to point out that delays in the case were unconscionable, in violation of Order 32 of General Orders in Bankruptcy, and unjust. This is dictum; *Wolfe* cannot be read to require discharge when there has merely been excessive delay.

11 U.S.C. §32(c) requires the Bankruptcy Court to grant the discharge unless satisfied that the bankrupt has "(1) committed an offense punishable by imprisonment as provided by Section 152 of Title 18." 18 U.S.C. §152 provides for a fine or imprisonment or both for a person who "knowingly and fraudulently makes a false oath or account in or relation to any bankruptcy proceeding."

The Bankruptcy Judge found that two questions were answered falsely by Stafos in the statement of affairs:

> 2.c. Have you been in partnership with anyone or engaged in business during the six years immediately preceding the filing of the original petition herein?
>
> Answer: No.

10.a. What property have you transferred or otherwise disposed of during the year immediately preceding the filing of the original petition herein?

Answer: None.

With respect to the partnership question, the Bankruptcy Judge stated:

> [F]rom the filing of partnership tax returns in 1966 and 1967, and the setting out of partnership I.D. No. 48-0147823-A therein, undisputed testimony of plaintiff, and reference to partnership in personal tax returns, that defendant entered into a business partnership with one Robert Burdine, a/k/a Bob Burdine, on or about January 1, 1966, and that he had been in a partnership during the six (6) years immediately preceding December 23, 1970; that said false answer to question 2.c. was knowingly made by the defendant to a material issue with an intent to defraud his creditors and thereby constitutes the ground for denial of discharge under section 14c(1).

Stafos argues not that the Bankruptcy Judge interpreted the evidence erroneously, but rather that he ignored the evidence produced by the bankrupt. Bell's testimony on this issue merely laid the foundation for the introduction of the tax returns. It is undisputed that they were prepared by a CPA, George Sinderson. Neither Mr. Sinderson nor Stafos testified. Wayne R. Valentine, a CPA who was an associate of Sinderson's firm, did testify as follows:

Q. All right, can you tell the Court why further partnership returns were not filed subsequent to Exhibits 1 and 2?

A. Yes. On examining the records, the method of operations that James Stafos and Bob Burdine used, I concluded that there was no partnership, particularly from the standpoint of tax savings and this was discovered as a routine matter of examining their records and in determining income for both operations.

Q. Did you disclose that fact to Mr. Stafos and Mr. Burdine?

A. Yes, I did. I told them that they were filing the improper accounting forms. That they did not have a partnership, from what I understood of their arrangements, and that we were filing the wrong tax returns.

Q. Was the decision made as to whether to go back and amend the returns for 1966 and '67, that is, Exhibits 1 and 2?

A. I took the situation back to the manager partner of George Sinderson and Company, which at that time was George Sinderson, described to him what I had discovered and we together decided not to go back and amend the '66 and '67 partnership returns or the individual returns which are based on those.

Q. Did you discuss that decision with Mr. Stafos and Mr. Burdine?

A. Yes. We advised them that we felt there would be no material change in taxable incomes or taxable amounts that were due, and we suggested to them that we begin with the year 1968 to file the proper form. (Tr. 264-65.)

On cross-examination, Valentine outlined why he concluded that no partnership agreement existed:

Q. (By Mr. Venters) Was there any other reason that it was determined that they did not want to be in a partnership in this case?

A. Other than my two judgments based on the two reasons I have just given?

Q. Yes.

A. One, they stated they were not in partnership, so I kind of accepted that. Now you are asking me to respond to that time period back in 1969. You know, there is much transpired since then, so I am trying to keep clear as to how I made my decision at that time.

Q. Well, if they told you they were not in partnership, wasn't that sufficient? Did you need any other reason?

A. Yes. I believe if a taxpayer tells you that he is, generally if you are a good accountant, just as a good attorney, you are going to look beyond into the substance of some of their activities to determine that they are correct in what they are explaining to you.

Q. Are you telling the Court that it was not on your advice that they decided they were not partners but they just decided they were not partners themselves?

A. That is what they stated to me, that they were not partners.

The record also contains the testimony of an attorney, Wash Brown, to the effect that he represented Stafos, helped him with the petition, and assumed he was not in a partnership because Stafos had always advised Brown that he and

Burdine were not partners. (Tr. 247.) He testified about the agreement between the two that he had drawn up for Stafos which stated that the arrangement was not a partnership. Only an unsigned copy of the agreement was offered and it was not admitted. (Tr. 251.)

In *Wolfe, supra* at 19-20, the Tenth Circuit held that reliance on an accountant's statement was sufficient to rebut an inference of fraudulent intent and stated:

> Appellants relied on a certified public accountant. Was that wrong? Every businessman of any consequence in this country relies on such accountants, as do most of the government agencies, local, state, and national. Many of them otherwise would not know their own financial condition. They rely on them in making financial statements and reports. Certified public accountancy is a profession. If the businessman is required to check the trained accountant, why employ him in the first place? Why not rely on a good bookkeeper who would be much less expensive? No, reliance on trained, licensed public accountants is almost universal. It has become the custom of the trade.

The Bankruptcy Judge did not, of course, have the benefit of a transcript in writing his opinion. We believe that he erred in denying discharge on the basis of Stafos' answer to question 2.c.

With respect to the question about property transferred, the Bankruptcy Judge found as follows:

> Also under the Statement of Affairs in defendant's petition for bankruptcy, in response to question 10.a., the defendant responded that he had not transferred or otherwise disposed of any of his property during the year immediately preceding the filing of his petition for bankruptcy on December 24, 1970. Defen-

dant's 1969 individual income tax returns (federal and state) show that defendant owned and took depreciation on trucks and trailers for the calendar year 1969 in the amount of $51,652.42, with a total cost shown of $133,983.69. In his petition for bankruptcy, no trailers were listed as owned by defendant. Three trucks were listed as having a value of $3,685.00. Several other trucks and trailers, not listed by defendant in his petition and not claimed as owned by him, were subsequently discovered by trustee and sold as property belonging to the bankrupt estate for the total sum of $3,835.00. Other evidence showed there were a number of vehicles claimed on defendant's depreciation schedule for the year 1969 which were traded or disposed of after December 31, 1969, and appeared in the bankruptcy estate of Robert G. Burdine, No. 21267-B-4, in the United States District Court for the District of Kansas. The Court finds that the defendant's answer to question 10.a. under the Statement of Affairs was knowingly false and made with regard to material issue with an intent to defraud his creditors.

The vehicles in question were in Stafos' name on December 31, 1969 and he claimed depreciation in his 1969 tax return. Stafos argues that the inference that he transferred them in the year prior to filing was rebutted by an accountant's work paper which shows only 11/12ths of the depreciation for 1969, that is that the equipment was disposed of prior to December 1969.

Stafos also argues that the testimony of Wash Brown shows that Stafos relied on the advice of counsel in answering the question as he did. "An explanation by a bankrupt that he acted upon advice of counsel who in turn was fully aware of all the related facts generally rebuts an inference of fraud." *In the Matter of Mascolo*,

505 F.2d 274, 277 (1st Cir. 1974). Brown testified that he discussed certain trucks, which Stafos told him were Robert Burdine's, although they were still in Stafos' name. Brown told him not to transfer title, but not to list them as his property. (Tr. 386.) Brown stated that Stafos must have told him when he disposed of them and, if it had been within the year, Brown would have put them on the schedule. (Tr. 407.)

Bell argues that a full year's depreciation was taken on the 1969 tax return and that the work paper is not sufficient explanation. With regard to reliance on Brown's advice, Bell contends that there was no full disclosure by Stafos, as shown by Brown's answers to questions on cross-examination:

> Q. With regard to those trucks that he said were in his name and that were not listed, did he tell you he was making the payments on them at the bank?
>
> A. No, sir, it is my recollection that he did not.
>
> Q. Did he tell you that he was, had been operating the trucks while they were in his name?
>
> A. I do not recall that. I am confident he was not. (Tr. 407.)

We have some doubts about whether Bell showed by a preponderance of the evidence that Stafos "knowingly and fraudulently" made a false answer to question 10.a, and thus we believe the Bankruptcy Judge erred in this regard.

With respect to 11 U.S.C. §32(c)(3), the Bankruptcy Judge found that Stafos had obtained credit from Bell by publishing a materially false statement of his financial worth in the Produce Reporter Company's "Blue Book." A financial statement, apparently prepared by Stafos' ac-

countant, showing Stafos' net worth as $95,960.64 as of December 31, 1966, and net profit for 1966 as $46,598.85, was sent to the Produce Reporter with a transmittal letter stating that it was being forwarded at the request of Stafos. A copy was shown to have been sent to Stafos. Stafos' tax returns for 1966 show a net loss to James Stafos Produce of $9,442.70.

It seems clear that this was a materially false statement. There is nothing in the record to indicate that Stafos ever attempted to withdraw the financial statement. Bell testified that he relied on the Blue Book statement, among other things, in extending credit. We are satisfied that Bell showed by a preponderance of the evidence the required elements for a denial of discharge under 11 U.S.C. §32(c)(3). *See Wolfe, supra* at 18-19.

Although we cannot uphold the Bankruptcy Judge's denial of discharge under subsection (1) of 11 U.S.C. §32(c), we are convinced that it was proper under subsection (3). His decision refusing discharge is therefore affirmed.

IT IS SO ORDERED.

Counsel for Robert Bell is directed to prepare, circulate and forward to the court for approval a journal entry of judgment reflecting the holding of the court.

Dated this 17 day of October, 1979, at Kansas City, Kansas.

/s/ Earl E. O'Connor
United States District Judge

(Filed January 23, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
BANKRUPTCY DIVISION

Bankruptcy No. 21239-B-4

In the Matter of:

JAMES GEORGE STAFOS,
Bankrupt,

ROBERT D. BELL,
Plaintiff,

- VS -

JAMES GEORGE STAFOS,
Defendant.

MEMORANDUM OPINION

On August 20, 1971, the plaintiff, Robert D. Bell, filed his original Complaint objecting to discharge of the defendant, James George Stafos, bankrupt, under sections 14c(1), 14c(2), 14c(3), 14c(4), 14c(6) and 14c(7) of the Bankruptcy Act [11 USCA §32(c)(1), (2), (3), (4), (6) and (7)]. The complaint was amended to include dischargeability of debt under section 17a(2) of the Bankruptcy Act [11 USCA §35(a)(2)] and filed on January 25, 1975, before the Honorable J. Milton Sullivant, then Bankruptcy Judge. The plaintiff was represented by his attorneys, Harley E. Venters, of Oklahoma City, Oklahoma, and John J. Ziegelmeyer, of Kansas City, Kansas. The defendant was rep-

resented by his attorneys, William O. Isenhour, Jr. and Thomas E. Joyce.

This matter came on for trial on September 13, 14 and 15, 1977, at Kansas City, Kansas, and after hearing testimony of witnesses, statements of counsel, and examining the files, briefs and exhibits herein, said case was taken under advisement. This Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant-bankrupt, James George Stafos, filed his voluntary petition in bankruptcy on December 24, 1970, accompanied by schedules sworn to by him.

2. It may be noted that the plaintiff herein has, in his original complaint objecting to discharge and amendments thereto, filed specifications under practically all of the 14c sections of the Bankruptcy Act [11 USCA §32(c)].

Section 14c(1) of the Bankruptcy Act [11 USCA §32(c)(1)] states in pertinent part as follows:

> "c. *The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under title 18, United States Code, section 152;* * * *."

Title 18 USCA §152 states in pertinent part as follows:

> "*Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankrupt proceeding; or*
>
> *Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty or*[1] *perjury as permitted under section*

---

1. *So in original.*

1746 of title 28, United States Code, in or in relation to any bankruptcy proceeding; * * *."

In the Statement of Affairs (bankrupt not engaged in business) filed in the voluntary petition herein, the following questions and answers were given:

"2.c. Have you been in partnership with anyone or engaged in business during the six years immediately preceding the filing of the original petition herein?

Answer: "No."

"10.a. What property have you transferred or otherwise disposed of during the year immediately preceding the filing of the original petition herein?"

Answer: "None."

In the Statement of Affairs (Bankrupt engaged in business) filed herein, the following questions and answers were given:

"15.a. What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 percent or more of the issued and outstanding stock, of the corporation?"

Answer: "None—not engaged in business since September 18, 1969."

3. The plaintiff further alleged in his specifications that in violation of section 14c(4) of the Bankruptcy Act, the bankrupt knowingly and fraudulently concealed, removed or destroyed assets of the estate with intent to hinder, delay or defraud his creditors.

4. The plaintiff herein also alleges that the defendant's actions fall within section 14c(1) by his executing the verification in the voluntary bankruptcy petition's Statement of Affairs, denying that he had been in a partnership with anyone during the six (6) years immediately preceding the filing of his petition.

On February 15, 1967, the defendant filed a partnership return for the calendar year of 1966 (*Pl. Ex. #1*) with Robert G. Burdine, d/b/a Wolcott Farms, with an employer's identification number of the partnership listed as 48-0714823-A.

5. On April 15, 1968, defendant filed Application for extension of time in which to file partnership return for the calendar year of 1967, using employer's identification No. 48-0714823-A (same as 1966).

6. On May 13, 1968, a second partnership income tax return (*Pl. Ex #2*) was filed by the defendant and Robert (Bob) G. Burdine for the year ending 1967. Both tax returns (1966 and 1967) were prepared by George W. Sinderson, a certified public accountant, with the firm of Baird, Kurtz and Dobson.

7. In his 1966 personal income tax return (*Pl. Ex #3*), on Schedule B, part III(1), Form 1040, the defendant listed income or losses from partnership of Wolcott Farms, Kansas City, Kansas of $1,258.39, showing ID No. 48-0714823-A.

8. Also, on defendant's 1967 personal income tax return (*Pl. Ex. #4*), on Schedule D, Form 1040, Gains and Losses for Sales or Exchanges of Property, Part I(6), the following is set out:

> "6. Enter the full amount of your share of net long-term gain (or loss) from partnership and fiduciaries—Wolcott Farms, $1,258.39."

9. In 1967 Tax Form 3468, Computation of Investment Credit, Schedule A, referring to part of his investment made by partnership (Wolcott Farms, 5640 Wolcott Drive, Kansas City, Kansas) the defendant listed as an attachment to tax return, $3,930.21 - 4 to 6 life years, and $4,759.55 - 8 + life years.

10. The plaintiff, Robert D. Bell, testified that defendant, James George Stafos, told him the latter part of 1967 or early 1968 that he (Stafos) and Robert Burdine were partners in the farming business. This testimony was not disputed.

11. The defendant filed 1966 State of Kansas Partnership Return of Income under Employer's I.D. No. 48-0714823-A and listed he and Bob G. Burdine as partners. They were also represented by the accounting firm of Baird, Kurtz & Dobson.

12. In June, 1969, the defendant filed Federal Tax Return Schedule C (Form 1040), Profit (or Loss) from Business as a Sole Proprietorship under the name of James Stafos Produce, giving Employer's I.D. No. 48-0654257, but did not file a partnership return.

13. In 1966, 1967 and 1968, it is recorded that a number of items were mortgaged in which Robert Burdine and George Stafos were co-mortgagors purchasing equipment for Wolcott Farms.

14. In his income tax return for the year of 1969 (*Pl. Ex.* #6), the defendant listed his depreciation for trucks and trailers for that year as $51,652.42. In response to Discovery Order on October 17, 1971, in completing depreciation schedule, the defendant listed his depreciation for the year of 1969 as $26,024.37.

15. The defendant, James George Stafos, did not testify in this case. Wash Brown, an attorney licensed to

practice in the state of Kansas who represented the defendant at the filing of his voluntary petition on December 24, 1970, but withdrew prior to this trial, testified that it was he who advised the defendant to fill out his schedules in the manner in which they were drafted; that he listed the creditors but did not know whether defendant, Stafos, knew whom he had listed; he did not list the trucks in Stafos' name because Stafos said the trucks did not belong to him.

16. Plaintiff's Exhibit No. 17 was a letter signed by the defendant, stamped as received by Produce Reporter Co. on August 19, 1968, and attached thereto was a combined Balance Sheet of James George Stafos Produce, a proprietorship, and Wolcott Farms, a partnership, for the year preceding December 31, 1967.

17. Plaintiff's Exhibit No. 38 shows Robert Burdine and defendant, Stafos, as co-mortgagors for the purchase of equipment over a period of years. Plaintiff's Exhibits No. 39, 40 and 41 are evidence that in 1966 and 1967, James G. Stafos and Robert (Bob) Burdine under the name of Wolcott Farms, operated as a partnership.

18. The Court finds from the evidence herein, including the testimony of Wayne Valentine, accountant for years subsequent to 1968, and Laurence Jarvis, Trustee, that there was not sufficient evidence to show willful destruction, mutilation, concealment or failure to keep or preserve books of account or records from which the defendant's financial condition might be ascertained in violation of section 14c(2) of the Bankruptcy Act, since the bankrupt's acts were justified under the circumstances herein. At the first meeting of creditors, books and records were brought into the courtroom; a report was made to the Court that there was an additional pick-up truck full of records outside the Courthouse; the trustee stated he

had no place to store the records in the truck and requested the defendant keep them until he (the trustee) found a proper place for storage; the records were returned to the dock warehouse at 5640 Wolcott Drive and subsequently placed in a box car, which later disappeared. There is no evidence as to what happened to the box car.

19. By transmittal letter dated February 15, 1967, defendant, d/b/a James G. Stafos Produce, a licensed produce dealer under the U. S. Perishable Agricultural Commodities Act of 1931, furnished through his accountant, a financial statement in writing to Produce Reporter Co., a credit agency for the fresh fruit and vegetable industry, showing a net worth of $95,960.64 as of December 31, 1966, and a net profit for the year from January 1, 1966, to December 31, 1966, of $46,598.85. That by reason of said financial statement, the defendant obtained a credit worth financial responsibility rating by Produce Reporter Co. in excess of $50,000.00 which was published and shown in the Spring, 1967 Blue Book.

20. Plaintiff, a licensed produce dealer under the U. S. Perishable Agricultural Commodities Act of 1931, and a subscriber to the Produce Reporter Co. Blue Book, testified that after seeing the rating of defendant and relying thereon, he (plaintiff) furnished credit to defendant by consignment of fresh fruit and vegetables, largely watermelon and cantaloupe, beginning in May of 1967. That such credit arrangement would not have been entered into by him (plaintiff) with defendant, except for the Produce Reporter Co.'s rating of credit worthiness as shown in the Spring, 1967 Blue Book.

21. The plaintiff further testified that said financial statement of December 31, 1966, was published by the Produce Reporter Company in the 1967 Blue Book and the defendant knew he was a subscriber. This also was undisputed since the defendant did not testify at the trial.

ISSUES INVOLVED

1. Whether or not the false statements made under oath in the petition for voluntary bankruptcy were knowingly and fraudulently made and constitute grounds for objections to discharge under section 14c(1) of the Bankruptcy Act [11 USCA §32(c)(1)].

2. Whether or not the bankrupt failed to keep and preserve records of his business transactions, from which his financial condition could be ascertained, constituting grounds for objection to discharge under section 14c(2) of the Bankruptcy Act [11 USCA §32(c)(2)].

3. Whether or not while engaged in a partnership, the bankrupt obtained property by causing to be published, a materially false statement in writing respecting the financial condition of the partnership, constituting grounds for objection to discharge under section 14c(3) of the Bankruptcy Act [11 USCA §32(c)(3)].

4. Whether or not the bankrupt, at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred or concealed or permitted to be removed or concealed, any of his property with intent to defraud his creditors, constituting grounds for objection to discharge under section 14c(4) of the Bankruptcy Act [11 USCA §32(c)(4)].

5. Whether or not the bankrupt, in the course of the proceedings under this Act, refused to obey any lawful order of the Court, thereby constituting grounds for objection to discharge under §14c(6) of the Bankruptcy Act [11 USCA §32(c)(6)].

6. Whether or not the bankrupt failed to explain satisfactorily, any losses of assets, thereby constituting grounds for objection to discharge under section 14c(7) of the Bankruptcy Act [11 USCA §32(c)(7)].

CONCLUSIONS OF LAW

The Court has jurisdiction over the subject matter and the parties, pursuant to section 14c of the Bankruptcy Act [11 USCA §32(c)], and venue is proper.

The proceedings are governed by Bankruptcy Rules 404 and 701 et seq.

That under section 14c(1) of the Bankruptcy Act, the plaintiff herein proved by a fair preponderance of the evidence that the defendant committed an offense in violation of 18 USCA §152 in that on December 23, 1970, the defendant signed the petition for voluntary bankruptcy which stated:

> "I, James George Stafos, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief."

This same statement was also executed by the defendant, Stafos, at the end of the Statement of Affairs. (Both statements were under oath)

Under the Statement of Affairs in defendant's petition in bankruptcy, in response to question 2.c., defendant denied he had been in partnership with anyone during six (6) years immediately preceding the filing of the petition in bankruptcy. The Court finds from the filing of partnership tax returns in 1966 and 1967, and the setting out of partnership I.D. No. 48-0714823-A therein, undisputed testimony of the plaintiff, and reference to partnership in personal tax returns, that defendant entered into a business partnership with one Robert Burdine, a/k/a Bob Burdine, on or about January 1, 1966, and that he had been in a partnership during the six (6) years immediately preceding December 23, 1970; that said false answer to ques-

tion 2.c. was knowingly made by the defendant to a material issue with an intent to defraud his creditors and thereby constitutes a ground for denial of discharge under section 14c(1).

Also under the Statement of Affairs in Defendant's petition for bankruptcy, in response to question 10.a., the defendant responded that he had not transferred or otherwise disposed of any of his property during the year immediately preceding the filing of his petition for bankruptcy on December 24, 1970. Defendant's 1969 individual income tax returns (federal and state) show that defendant owned and took depreciation on trucks and trailers for the calendar year 1969 in the amount of $51,652.42, with a total cost shown of $133,983.69. In his petition for bankruptcy, no trailers were listed as owned by defendant. Three trucks were listed as having a value of $3,685.00. Several other trucks and trailers, not listed by defendant in his petition and not claimed as owned by him, were subsequently discovered by trustee and sold as property belonging to the bankrupt estate for the total sum of $3,835.00. Other evidence showed there were a number of vehicles claimed on defendant's depreciation schedule for the year 1969 which were traded or disposed of after December 31, 1969, and appeared in the bankruptcy estate of Robert G. Burdine, No. 21267-B-4, in the United States District Court for the District of Kansas. The Court finds that the defendant's answer to question 10.a. under the Statement of Affairs was knowingly false and made with regard to material issue with an intent to defraud his creditors.

In the defendant's 1967 personal income tax Schedule B, Part III(1), Form 1040, the defendant listed income or losses from the partnership at Wolcott Farms, Kansas City, Kansas, I.D. No. 48-0714823-A as $1,258.39.

Further, on his 1967 personal income tax return (Form 1040), at Schedule D, Gains and Losses from Sales or Exchanges of Property, Part I(6), where he was directed to enter the full amount of his share of net long-term gain (or loss) from Partnership and Fiduciaries, the defendant set out—"Wolcott Farms $1,258.39".

Also, on 1967 Form 3468, Computation of Investment Credit, Schedule A, in referring to part of his investment made by partnership (Wolcott Farms), the defendant listed as an attachment to tax return, the following: $3,930.21 - 4 to 6 life years, and $4,759.55 - 8 + life years. This is further evidence to satisfy the Court that section 14c(1) of the Bankruptcy Act was violated.

The defendant's attorneys argued that the plaintiff cannot sustain the burden of proof that fraud was involved and relied upon the testimony of his accountant that he (defendant) acted upon his accountant's advice in the filing of the partnership returns; however, the accountant, George W. Sinderson, who actually filed the 1966 and 1967 returns did not testify at the trial.

They further argued that his voluntary petition in bankruptcy, including the Schedule of Affairs, was prepared by his attorney, Wash Brown, and that he acted upon the advice of Attorney Brown, who subsequently withdrew from the case. Mr. Brown testified that the petition was prepared on his advice; however, there is no showing herein that full disclosure was ever made to Mr. Brown by this defendant and from the multiplicity of references to the partnership in the Schedules and Statement of Affairs; the filing of partnership returns in both state and federal for two years; the reference in his personal income tax returns to the partnership and the fact that the defendant had a separate partnership employers identification number (48-0714823-A), the Court can only find that full

and complete disclosure had *not* been made to Attorney Brown; therefore acting on advice of counsel cannot be used as a defense in this case. 1A Collier on Bankruptcy ¶14.23, pg. 1330.

In the matter of *Gerald A. Mascolo*, 505 F.2d 274, 277, 1st Cir. (May, 1974), the Court stated:

> *"We agree that an explanation by a bankrupt that he had acted upon advice of counsel who in turn was fully aware of all the relevant facts generally rebuts an inference of fraud.* See *In re Topper, 229 F.2d 691 (3d Cir. 1956); Jones v. Gertz, 121 F.2d 782 (10th Cir. 1941); In re Stone, 52 F.2d 639 (D.N.H. 1931).*"

The Court further stated, on page 277, as follows:

> *"In the absence of extenuating circumstances the referee was entitled to infer that the statement was fraudulent."*

On page 276, the court also stated:

> *"The trier of fact may rely upon reasonable inferences as well as direct evidence. Thus, the trier may infer fraudulent intent from an unexplained false statement."*

In 1A Collier on Bankruptcy ¶14.25, at page 1336, it is stated:

> *"The false oath must have been knowingly and fraudulently made. That is, the statement must contain matter which the bankrupt knew to be false and he must have included them willfully with intent to defraud. The requisite intent, however, may be discovered by inference from the facts."*

I find that the false oaths herein were knowingly and fraudulently made with willful intent to defraud, in violation of section 14c(1) of the Bankruptcy Act [11 USCA

§32c(1)] and that the plaintiff sustained the burden of proof herein by a preponderance of the evidence.

Under section 14c(2) of the Bankruptcy Act, wherein the plaintiff alleged that the defendant *"concealed or failed to keep or preserve books of account or records"*, I find that the failure to produce records herein was justified under the circumstances, in that it is undisputed that at the first meeting, the defendant brought a pick-up truck full of records to court and tendered them to the appointed trustee. The trustee requested that the records be returned to their original location. The records were lost through some unknown means. No fraudulent intent can be inferred since there were extenuating circumstances; thus, the plaintiff did not sustain the burden of proof and the complaint under section 14c(2) must be dismissed.

The plaintiff further alleges that the defendant should be denied a discharge for violation of section 14c(3) of the Bankruptcy Act, for while engaged in business he caused a false and fraudulent financial statement to be published in Produce Reporter Company's "Blue Book" for the year ending December 31, 1966, and furnished the same through his accountant, George W. Sinderson. The statement set out that defendant's net worth was $95,960.64 as of December 31, 1966, and that his net profit for the year from January 1, 1966 to December 31, 1966, was $46,598.85 (*Pl. Ex. 17*) which resulted in defendant's rating in Produce Reporter Company's "Blue Book" being published in the spring of 1967, in excess of $50,000.00. The plaintiff, a subscriber to "Blue Book", testified he read this rating in the "Blue Book" and relied upon it; thereafter, giving credit to the defendant by consignment of fresh fruit and vegetables beginning in May, 1967. The defendant's individual federal and state income tax returns for 1966 showed a net loss of James Stafos Produce in the amount of $9,442.70.

The defendant-bankrupt alleges that his accountant gave the financial statement to Produce Reporter Company; that there were blank spaces on the side of the statement which defendant signed; and thus, does not constitute a materially false statement by said defendant. Neither the defendant nor his accountant for the 1966 and 1967 returns, George W. Sinderson, testified at the trial. The Court is not influenced by this argument of the defendant and to the contrary, believes it is clear that the plaintiff, Robert D. Bell, would not have extended credit to the defendant had he not read the financial statement in the "Blue Book".

The Court therefore, finds that the credit obtained by the defendant was the direct result of the making and publishing in the Produce Reporter Company's Blue Book of the materially false statement in writing of the financial status of the partnership. *Rogers v. Gardner*, 226 F.2d 864, 9th Cir. (1955) (case directly in point); and *In Re Solari Furs*, 263 F.Supp. 658, E.D.Mo. (1967).

In *Rogers v. Gardner*, 226 F.2d 864, 867, 9th Cir. (1955), the Court stated:

> *"A quotation from our Yates case, supra, 163 F.2d at page 958, seems appropriate: '* * * The appellant was under no compulsion, either legal or moral, to give out any statement whatsoever. But having elected to release certain figures pertaining to his business, it was his duty, both legal and moral to see to it that those figures were as accurate as he could make them. It is clear that he did not put out the necessary effort to make his information conform to his high standard.' Nor can we ignore the policy behind the discharge features of the Bankruptcy Act. Discharge may be a matter of right, but only if the bankrupt does not fall within certain circumscribed patterns of conduct delineated in §14(c). . . ."*

The Court thus finds that the plaintiff proved by a preponderance of the evidence, that defendant while engaged in business of a partnership, obtained credit by (1) causing to be published a written financial statement; (2) it was materially false as to financial condition of the partnership; (3) falsity of which the bankrupt knew; (4) by the use of the statement he obtained credit; (5) and the creditor relied upon the statement.

The defendant relies heavily on *Wolfe v. Tri-State Insurance Co.*, 407 F.2d 16, 10th Cir. (1969), in support of his contentions that he had a right to rely on his certified public accountant who prepared his financial statement. It is the view of this Court that the *Wolfe* case is clearly distinguishable from the instant case in that both Wolfe brothers took the stand and testified "they did not instruct the C.P.A. to do other than make a correct financial statement;" that they were uneducated and unsophisticated men; and that they relied upon him. In the instant case, the defendant did not testify, nor did the C.P.A. (George Sinderson) testify. Thus, the plaintiff's testimony was virtually undisputed and the *Wolfe* case, in the opinion of this Court, does not apply here.

The bankrupt-defendant herein was engaged in business within the meaning of §14c(3) of the Bankruptcy Act; the financial statement published in the Blue Book was materially false and there was reliance upon it by the plaintiff.

It is also the opinion of this Court that the plaintiff failed to sustain the burden of proof in sections 14c(4) and 14c(6) of the Bankruptcy Act [11 USCA §32c(4) & (6)]. Therefore, the complaints under those sections must be dismissed.

As to §14c(7) of the Bankruptcy Act, wherein the plaintiff alleged that the bankrupt-defendant failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities, the Court finds that although there are some inconsistencies, there was not sufficient evidence to warrant a finding that the objection to discharge should be sustained on those grounds. Therefore, said objection will be overruled and dismissed.

The objection to dischargeability of debt under section 17a(2) of the Bankruptcy Act [11 USCA §35a(2)] was first plead and filed in an amended complaint objecting to discharge after the time had expired in which to file complaints to determine dischargeability of debts under sections 17a(2), (4) & (8) of the Bankruptcy Act; therefore, was not timely filed and should be dismissed (§17c(2).

In reaching its decisions in this case, the Court is ever cognizant of the rule as set out in *The Matter of Paul V. Fuhrman*, 385 F.Supp. 1185, 1186, USDC, WDNY (1973), where the Court stated:

> *"We start with the premise that 'the basic purpose of the Bankruptcy Act [is] to give the debtor a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." . . .' Lines v. Frederick, 400 U.S. 18, 19 . . . (1970). Exceptions to a discharge should be construed, so far as reasonable, in favor of the bankrupt. Gleason v. Thaw, 236 U. S. 558. . ."*

In *Gonzales v. Aetna Finance Co.*, 468 P.2d 15, 17, it is stated:

> *"One of the purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtednesses and to permit him to start afresh, free from obligation and responsibilities consequent upon*

business misfortunes and to give him a clear field from future effort unhampered by pressures and discouragement of preexisting debt."

I am further mindful of the decision in *In the Matter of Vickers,* 577 F.2d 683, 687, 10th Cir. (1978), where the Court stated:

". . . To be false or fraudulent within the meaning of the statute the statement must be more than erroneous. It must have been false and intended to deceive, and relied upon by the creditor. In Re Taylor, *514 F.2d 1370 (9th Cir. 1975);* Wolfe v. Tri-State Insurance Company, supra; American National Bank of Denver v. Rainguet; *323 F.2d 881 (10th Cir. 1963). . .*"

For reasons set out above, the Court finds that the plaintiff's objection to discharge of the defendant should be sustained and the defendant's general discharge must therefore, be denied.

THE FOREGOING SHALL CONSTITUTE MY FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER BANKRUPTCY RULE 752 AND RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Dated this 22nd day of January, 1979.

/s/ Benjamin E. Franklin
Benjamin E. Franklin,
Bankruptcy Judge

Opposition

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1884

In the Supreme Court of the United States

October Term, 1981

JAMES GEORGE STAFOS,
Petitioner,

vs.

ROBERT D. BELL,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HARLEY E. VENTERS
Counsel of Record
4545 North Lincoln Boulevard
Suite 104 North Terrace
Oklahoma City, Oklahoma 73105
1-405-528-3344
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert D. Bell, the respondent, prays the petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, to review the judgment entered in the above-entitled case on December 16, 1981, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 666 F. 2d 1343. The Memorandum and Order of the United States District Court for the District of Kansas and the Memorandum Opinion of the Bankruptcy Division thereof are printed in Appendix "A" of petitioner's petition. The Journal Entry and Judgment of the United States District Court for the District of Kansas, Bankruptcy Division is printed in Appendix "A" hereto, infra, page A1.

STATUTE AND RULES INVOLVED

11 U.S.C. § 32(b)

> (2) Upon the expiration of the time fixed in the order for filing objections or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this Act have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

Rule 16, F. R. Civ. P. Pre-Trial Procedure: Formulating Issues

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues; etc.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . .

Rule 41, F. R. Civ. P. Dismissal of Actions

> (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply

with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF CASE

Petitioner James George Stafos, a Kansas resident, was licensed as a produce dealer by the U. S. Department of Agriculture in the year 1965. He operated his business in the Kansas City area. In his U. S. Individual Income Tax Return, a joint return with his wife, Reva, for the year 1966, prepared by George W. Sinderson, a Kansas City, Missouri CPA, petitioner included therein a *Statement to Show Insolvency as of December 1, 1966.* The net amount of insolvency of petitioner shown in the statement was $169,923.64. His 1966 U. S. Individual Income Tax Return showed business losses of James Stafos Produce, $9,442.70 and Wolcott Farms, a partnership, $25,677.72. The return for 1966 further showed wages earned of $1,125.00 and other income of $149.00, out of which Federal Income Tax had been withheld in the amount of $78.30 which was claimed as a refund. Wolcott Farms, a partnership, partners James Stafos and Bob G. Burdine, filed a U. S. Partnership Return of Income in 1966, prepared by accountant, George W. Sinderson showing gross sales of $247,582.61. In addition to the partnership tax returns and individual tax returns of petitioner there was a great deal of other evidence in the record showing petitioner and Bob G. Burdine were partners. There was evidence of the issuing of a partnership financial statement in 1968; selling of

partnership equipment; purchase of several items of equipment on credit as a partnership d/b/a Wolcott Farms evidenced by chattel mortgages during the years 1966, 1967 and 1968, and undisputed testimony of respondent that petitioner told him in 1967 that he, petitioner, and Burdine were partners in the farming business.

In the year 1967 petitioner became a moderately large produce dealer in the Kansas City Area. His U. S. Individual Income Tax Return for the year 1967 showed gross sales of James Stafos Produce, a proprietorship, of $1,429,954.50. The 1967 U. S. Partnership Return of Income of petitioner and Bob G. Burdine d/b/a Wolcott Farms showed gross sales of $246,247.78. After the year 1967, Partnership income tax returns of petitioner and Bob G. Burdine were discontinued by the parties. The volume of sales of James Stafos Produce continued large in 1968 and 1969 as shown by petitioner's U. S. Individual Income Tax Return as follows: 1968 (filed in June 1969), $1,214,351.05; 1969, $1,-032,200.00. In addition to gross sales said tax returns for 1968 and 1969 contained summary depreciation schedules which showed depreciation on truck, trailers, and office equipment claimed by petitioner for these years as follows: 1968, $49,553.14; 1969, $51,809.04. All of these returns were prepared by George W. Sinderson or the CPA firm of which he was a member from the books and records provided by petitioner. On September 24, 1969 the produce dealer's license of petitioner was suspended by the U. S. Department of Agriculture for failure to pay a reparation award of the Department in favor of Robert D. Bell, respondent in the approximate amount of $130,000.00 which award was made on August 19, 1969 after hearings held in October, 1968.

Preparation of petitioner's 1966 U. S. Individual Income Tax Return showing insolvency of over $169,000.00

was completed by February 13, 1967. (Of the 32 creditors listed on this statement of involvency, 18 were listed in Schedule A-2 of Petitioner's bankruptcy petition filed on December 24, 1970.) On February 15, 1967 a financial statement of petitioner d/b/a James G. Stafos Produce, a proprietorship, signed by petitioner and prepared by George W. Sinderson "unaudited" was mailed to Produce Reporter Company, a credit agency of the fresh fruit and vegetable industry located in Wheaton, Illinois who publishes a Blue Book for credit worthiness of persons or entities in the business. The financial statement furnished by petitioner to Produce Reporter Company showed James Stafos Produce had a net worth as of December 31, 1966 of $95,960.64 and a net profit for the year 1966 of $46,598.85 on gross sales of $520,338.26. There was nothing on the statement to indicate that it had been prepared other than on a cash basis for the year 1966 the same as petitioner's 1966 return which showed a loss of $9,442.70. As a result of this financial statement ending December 31, 1966, petitioner James G. Stafos obtained a financial rating of "50 M" in the Spring 1967 Blue Book indicating a credit worth financial responsibility in excess of $50,000.00.

Robert D. Bell, respondent, was in 1966 and since that year a U. S. licensed produce dealer in Ardmore, Oklahoma. In the years 1966 and 1967 Bell was producing vegetables, particularly watermelon and cantaloupes in the Rio Grande Valley near Laredo, Texas and was marketing this produce in cities throughout Texas, Oklahoma, Kansas and Missouri including the Kansas City Area. In 1966 Bell became acquainted with and did some minor business with petitioner in the Kansas City area. In the Spring of 1967 Bell planted a large crop of cantaloupes in the Valley. Preparatory to marketing the crop and in May 1967, Bell made a deal with petitioner for petitioner to handle his, Bell's cantaloupes, watermelons, etc. as a commission mer-

chant. Before entering into this arrangement with petitioner, Bell, an active trader and Blue Book subscriber, had noted petitioner's credit worthiness rating in the Spring 1967 Blue Book. Petitioner's credit worthiness as shown by the Blue Book was a basic ingredient in Bell's decision to enter into a commission arrangement with petitioner to handle his, Bell's produce. During the summer of 1967 Bell trucked and shipped to petitioner nearly $400,000.00 worth of cantaloupes and watermelons. Petitioner failed to account for over $130,000.00 of the produce sent to him to sell on a commission basis and petitioner was ordered by the Department of Agriculture to pay respondent reparation in that amount. On December 1, 1970 judgment was obtained in the United States District Court of Kansas by respondent Bell against petitioner Stafos on the reparation award of the U. S. Department of Agriculture. In the subsequent bankruptcy of petitioner, respondent Bell's claim constituted more than one-half of the amount of all creditor's claims approved by the Court.

On December 24, 1970 petitioner filed his voluntary Bankruptcy Petition. It contained two Statement of Affairs, one for bankrupt not engaged in business and one for bankrupt engaged in business. In the first Statement of Affairs he denied he had been in partnership with anyone during the six years immediately proceeding the filing of his bankruptcy petition contrary to the facts set forth above, and denied any transfer of property for the preceeding year contrary to a comparison of trucks and equipment depreciated in petitioner's 1969 tax return and trucks and equipment listed in his bankruptcy petition. In the second Statement of Affairs he denied he had engaged in business since September 18, 1969. In Schedule A-1 of his Bankruptcy Petition he listed indebtedness to the U. S. Internal Revenue Service for 4th quarter payroll taxes for the year 1969 in the amount of $1,700.00 which was

in conflict with his statement that he had not engaged in business after September 18, 1969. There was other evidence in the record that he had filed and paid employer quarterly payroll taxes for the 1st quarter of the year 1970.

The first meeting of creditors was held on February 12, 1971, prior to which respondent and credtior, Robert D. Bell, by and through his attorney requested by letter to attorney for petitioner that certain records, books, and bank records of bankrupt petitioner be produced at the hearing on February 12, 1971. The records requested were not produced separately and identified as such. Petitioner brought a pickup load of boxes of records to the hearing, which trustee, left in the possession of the bankrupt petitioner after the hearing, because the trustee had no place to store them. Petitioner took the records back to his former place of business and the then place of business of Bob G. Burdine, former partner. Bob G. Burdine had obtained a U. S. produce dealer's license on September 23, 1969 one day before petitioner's license was suspended and continued doing business as Wolcott Farms at the same old address, 5640 Wolcott Drive, Kansas City, Kansas. Under the law Burdine could not have obtained a produce dealer's license if he had been in partnership with a person (Stafos) whose license had been suspended. The books, bank statements, and records of petitioner were allegedly lost after being taken to Bob G. Burdine's place of business, 5640 Wolcott Drive and were never made available to creditors or the court thereafter. There was testimony at trial that petitioner had refused a few months earlier and in October 1969 to turn his books and records over to the U. S. Department of Agriculture for examination and on November 7, 1969 petitioner's PACA License or produce dealer's license was suspended a second time for failure to permit such examination.

On February 19, 1971 respondent Bell as creditor filed an application with the Bankruptcy Court to require petitioner to amend Schedule A-2 of his Bankruptcy Petition and to produce copies of his employer quarterly tax returns for the years 1969 and 1970 together with line item depreciation schedules on all equipment owned and for which depreciation was taken in his U. S. Income Tax Returns for the years 1967, 1968 and 1969 and if any equipment had been disposed to show the disposition thereof. On hearing of creditor Bell's application on March 18, 1971, bankrupt was ordered by the Court to amend Schedule A-2 and to furnish the other information requested above. On May 12, 1971 petitioner amended Schedule A-2. *On January 28, 1975* petitioner finally furnished a combined, incomplete, line item depreciation schedule for trucks and trailers for the years 1967, 1968, and 1969, attached as Exhibit "A" to his answer to respondent's Objections to Discharge. The depreciation to which petitioner was entitled for the year 1969 as computed in Exhibit "A" was $26,024.37 as compared to depreciation actually claimed on his 1969 income tax return for trucks and trailers of $51,652.42. The employer quarterly tax returns of petitioner for the years 1969 and 1970 ordered by the Court to be furnished were never furnished by petitioner.

The record is replete with stalling tactics of petitioner and outright refusal by petitioner to furnish records duly subpoened or ordered by the Court to be furnished by him. Respondent remains to this day unable to explain why the Bankruptcy Court did not deny a discharge to petitioner for failure to obey orders of the Court and to produce books and records. The alleged loss of the books and records taken to Bob G. Burdine's place of business was the excuse used by petitioner to stonewall on information requested. Petitioner's 1970 bank statements (which should

not have been in the business records supposedly lost since petitioner allegedly discontinued business in September 1969), were subpoened for a deposition hearing of petitioner in December 1971, deposition taken January 6, 1972. Petitioner failed to comply with the subpoena duces tecum to bring his 1970 bank statements and these bank statements were never furnished by petitioner. Typical, also, is the February 19, 1971, request of respondent for line item depreciation schedules on equipment, and employer quarterly tax returns for 1969 and 1970, heard by the Court and ordered of March 18, 1971 to be furnished. *First,* regarding line item depreciation schedules: The Internal Revenue Service permits taxpayer to attach and file a summary depreciation schedule with his 1040. However taxpayer or his tax preparer must keep a line item depreciation schedule to support the summary schedule. The line item schedules for 1967, 1968, 1969, the years in question were the schedules ordered to be furnished; the compliance by petitioner on May 12, 1971 was to furnish the summary schedule! He never did furnish separate line item depreciation schedules for the years ordered but finally in June of 1975 petitioner furnished a combined, incomplete, laboriously worked over, partially unreadable, line item depreciation schedule as noted above. *Second,* regarding employer quarterly tax returns on the years 1969 and 1970: the Court ordered petitioner to furnish these if in his possession or available to him. If petitioner did not have them in his possession they were readily available to him through the Internal Revenue Service which was shown in testimony at trial. Petitioner never furnished these returns and because of the delay in trial the Internal Revenue Service which destroys its copies after six years could not produce them for trial. While the Court did not deny a discharge to Petitioner for failure to keep, and preserve books and rec-

ords and to obey Orders to Produce, there is no question that the Courts below took these facts into consideration in regard to petitioner's late raised complaints of delay in trial. The trustee made an application for production of records which was never complied with. On May 18, 1971 trustee and creditor Bell filed a joint application to extend time for filing objections to discharge based on failure of petitioner to furnish records and information. During the course of the bankruptcy proceedings the trustee found ten or more trucks and vehicles in the possession of Bob B. Burdine belonging to petitioner which were not included as assets in his Bankruptcy Petition and which were sold by the trustee as assets of petitioner's bankruptcy estate.

Specifications and Objections to Discharge were filed by respondent on August 20, 1971 and Notice of pretrial on objections to discharge was issued on August 24, 1971. At the pretrial hearing on September 24, 1971 it was agreed by the parties to complete discovery by January 1, 1972 and then schedule another pretrial conference. The Court scheduled the next pretrial conference on April 20, 1972. Prior thereto and on January 24, 1972 the Bankruptcy Court had approved Trustee's Report of Exempt Property and petitioner took exceptions to report of referee which were set for February 22, 1972. Attorneys for Petitioner moved for a continuance on the exceptions to report of referee to April 17, 1972, by reason of which the pretrial conference on Objections to Discharge set for April 20, was again postponed. Petitioner was engaged in litigation on the homestead question to the United States District Court for the District of Kansas, Court of Appeals, Tenth Circuit, and to the Supreme Court by Petition for Writ of Certiorari, October Term 1973, No. 73-93 (denied) during the years 1972, 1973 and part of

1974 which in addition to appeals above included a separate action against trustee in the State District Court for Wyandotte County, Kansas. Of the approximately $24,000.00 net in the estate of bankrupt available for trustee fees and his attorney fees and for distribution to all creditors over forty percent (40%) of the estate was used up in trustee fees and attorney fees for attorney for trustee.

On November 13, 1974 the Honorable J. S. Sullivant set another pretrial conference to be held on the 6th day of January 1975. At the hearing, which was transcribed, the Court indicated he would set creditor Bell's Objections to Discharge for hearing in March, 1975. Attorneys for petitioner suggested April, 1975. Attorney for Creditor Bell stated April would be fine and that he would like to try it by then. On April 11, 1975, attorneys for petitioner filed a Motion To Continue Trial to at least October, 1975, which was granted. Then on October 1, 1975, petitioner's attorneys filed another motion to delay setting of trial. Respondent Bell never filed a motion for continuance. Before the case was set for trial Judge Sullivant resigned his judgeship in December 1975. In the proceeding memo filed by the Bankruptcy Court after the pretrial hearing on January 6, 1975 the Court ordered petitioner to provide information requested by creditor Bell some of which had been requested as far back as February 1971.

After Judge Franklin, who finally heard the case, became Bankruptcy Judge in 1976 and had begun preparation of the case for trial, among his first observations was the failure of petitioner to furnish information which had been requested and ordered to be furnished in preparation for trial. Judge Franklin held a pretrial conference on October 12, 1976, ordered petitioner to furnish information previously requested and granted additional time to complete discovery.

During the progress of the bankruptcy proceedings bankrupt Stafos had the advice and counsel of two attorneys, Mr. H. Wash Brown and Mr. Thomas E. Joyce both of the Kansas City, Kansas Bar. On March 21, 1977, another trial attorney, Mr. William O. Isenhour, Jr. was employed as additional counsel for petitioner. On March 22, 1977, Mr. Wash Brown withdrew as attorney for petitioner and subsequently was a witness at trial. After entry of appearance of Mr. Isenhour and on June 15, 1977 a supplemental pretrial conference was held and a pretrial order made setting the case for trial on September 13, 1977. Petitioner made no motion at pretrial to dismiss respondent's objections to discharge by reason of delay or move for discharge or make any legal objection to trial. Factually petitioner in the pretrial order stood on his answer filed on January 28, 1975.

The trial commenced on September 13, 1977 and was heard by Bankruptcy Judge Franklin over a period of three days. Petitioner Stafos did not testify at trial. Bob G. Burdine did not testify at trial. George W. Sinderson did not testify at trial.

At no time prior to September 13, 1977 or during the trial did petitioner make any complaint about trial delay or move for dismissal of Objections To Discharge or for a discharge by reason of delay in trial. At the conclusion of the trial Judge Franklin took the case under advisement and requested briefs, proposed findings of facts and conclusion of law; which were filed by the parties on October 20, 1977. Petitioner in his brief of October 20, 1977 for the first time argued the proposition that he was entitled to discharge by reason of delay in the trial. Judge Franklin did not address this argument of petitioner in his Memorandum Opinion of findings of fact and conclusions of law or the Judgment, denying discharge. On appeal to the United

States District Court for the District of Kansas and later on appeal to the United States Court of Appeals, Tenth Circuit, petitioner proposed and argued that he was entitled to a discharge by reason of delay in trial. Petitioner's proposition and argument on this issue was found to be without merit by both courts under the facts in this case.

Bankruptcy Judge Franklin in a well reasoned memorandum opinion found that petitioner James George Stafos should be denied a discharge pursuant to 11 U.S.C. § 32 (c)(1) in that he knowingly and fraudulently made false oaths in his Statement Of Affairs with intent to defraud his creditors in denying under 2. c. that he had not been in a partnership with anyone during the six (6) years immediately preceding the filing of his Petition In Bankruptcy and a false oath in denying under 10.a. that he had not transferred or otherwise disposed of any property during the year immediately preceeding the filing of his Petition In Bankruptcy; and further that petitioner should be denied a discharge pursuant to 11 U.S.C. § 32 (c)(3) for knowlingly causing, while engaged in business, to be published a materially false financial statement relied on by respondent and obtaining credit thereby.

On appeal the District Court affirmed the denial of discharge of petitioner by the Bankruptcy Court pursuant to 11 U.S.C. § 32 (c)(3) and reversed the denial of discharge pursuant to 11 U.S.C. § 32 (c)(1). Petitioner Stafos appealed to the Court of Appeals from the District Court's denial of discharge and respondent Bell cross-appealed from the reversal of the Bankruptcy Court's denial of discharge pursuant to 11 U.S.C. § 32 (c)(1). Since the denial of discharge by the District Court pursuant to 11 U.S.C. § 32 (c)(3) was affirmed by the Court of Appeals, the Court of Appeals did not consider respondent's cross-appeal.

REASONS WHY THIS WRIT SHOULD BE DENIED

I.

Petitioner here seeks a third appellate review of the Bankruptcy Court's denial of discharge which he contends was erroneous. Respondent contends that judgment of Court of Appeals is a correct decision but even if it be questionable it does not merit review by this Court.

It is respondent's position that neither petitioner's petition for this Writ or the history of litigation in this adversary proceeding presents the considerations generally necessary to justify this Court's review by certiorari.

In the first instance, petitioner contends for a novel rule of law, to wit: that he is entitled to a general discharge because of delay in the trial on the issue of discharge. He cites no statute nor a single case from any jurisdiction to support this contention and admits at top of page 10 of his petition that he has no knowledge of any case.

Second, the Rules of Bankruptcy Procedure and applicable Federal Rules of Civil Procedure provide a manner for dismissing a complaint for delay and failure to prosecute. Rule 41(b) of the Federal Rules of Civil Procedure, applicable to adversary proceedings in bankruptcy cases, provides that defendant may move for dismissal of an action for failure of plaintiff to prosecute. Such motion is addressed to the sound discretion of the trial court. Petitioner did not at anytime during the long history of litigation in this case file such motion. The reason is clear from the record. However a motion to dismiss respondent's objections to discharge for delay filed in the trial court would have been the proper method under the Rules to raise the issue sought to be raised here rather than a

request for discharge after trial. Respondent as plaintiff in the adversary proceeding had a right to be heard on the issue. 11 U.S.C. § 32 (b)(2). A motion to dismiss under Rule 41 filed in trial court would have provided an opportunity to petitioner, respondent, and the Court to have a due process hearing and develop the facts concerning delay.

Delay alone should never prevent a court from hearing a case, applying the law, and deciding issues on the merits. Before the 1938 amendments to the Bankruptcy Act, bankrupt was required to file an application for discharge within one year. Occasionally a bankrupt in the face of objections would not pursue the setting for trial and trial of his application for discharge. In such instances objecting creditors frequently requested the trial court to deny bankrupt a discharge on grounds of delay. Universally the courts have held that delay in trial of the application for discharge alone was not grounds for denial of discharge. In one case the Court heard the evidence and found that bankrupt was entitled to discharge fifteen years after application for discharge was filed. *In Re Renker*, 107 F. Supp. 261 (D.C.N.M. 1952). See also *Chessmen v. Teets*, (1957) 354 U.S. 156, 77 S. Ct. 1127.

Rule 16 of the Federal Rules of Civil Procedure also prohibits petitioner from raising the question of his entitlement to discharge by reason of delay in trial of the discharge issue. Rule 16, governing pretrial procedure, is applicable to adversary proceedings in bankruptcy cases. Rule 16 permits the trial court to limit the issues and contentions of the parties and the trial judge may reject contentions at trial not included in a proper pretrial order. *Trujillo v. Uniroyal Corp.* (CA N.M. 1979), 608 F2d 815.

The pretrial order formulated on June 15, 1977 under which this case was tried contained no contention by peti-

tioner that he was entitled to discharge by reason of delay in trial of the issue. Petitioner's contention in this regard was not raised at trial on September 13, 14, and 15, 1977. Bankruptcy Judge Franklin in his Order and Judgment properly ignored this contention made by petitioner for the first time in his post trial brief filed October 20, 1977.

For the above reasons this petition for writ should be denied.

II.

Petitioner seeks a consideration and determination of fact issues by this Court. In respondent's view whether petitioner was entitled to a discharge in this case presented a fact question which was resolved against him by three Courts below. Determination of fact questions are not ordinarily issues to be considered by the Supreme Court on certiorari. *United States v. Johnson,* (1925) 268 U.S. 220, 69 L. Ed. 925, 45 S. Ct. 496; *NLRB v. Waterman S. S. Corp.,* (1940) 309 U.S. 206, 84 L. Ed. 704, 60 S. Ct. 493, reh den 309 U.S. 696, 84 L. Ed. 1036, 60 S. Ct. 611.

Petitioner did not testify at trial to facts showing that he had been prejudiced or prevented from having a fair trial because of delay. He did not testify at all. There was no testimony or evidence at trial that petitioner was prejudiced by delay such as would prevent him from having a fair trial. The truth is that the delay in trial was caused by petitioner. Petitioner James George Stafos did not want a trial. It was clear from the beginning of petitioner's bankruptcy proceeding that if respondent Bell was willing to spend time and money to oppose petitioner's discharge, and justice prevailed, petitioner was not entitled to a discharge in bankruptcy. Delay helped petitioner! During the pendency of the bankruptcy and after the filing of his petition of December 24, 1970, property

subsequently acquired by petitioner belonged to petitioner. During his bankruptcy proceedings petitioner was protected from his creditors including creditor Bell, which time as stated by petitioner in his petition herein has been over eleven years. If this case had been tried in April 1975 when the court and respondent wanted to try it, everyone but petitioner and his attorneys, then in all likelihood petitioner's appeal rights would have expired three years ago and he would have been during the last three years subject to answering to his creditors.

Petitioner had another hope also from delay. There was always the possibility that respondent Bell would fold, give up. It was respondent Bell who was damaged the most in time and money by reason of delay. Petitioner and his attorneys lived in Kansas City, Kansas where the Bankruptcy Court was located. Respondent Bell lived in Ardmore, Oklahoma, a distance over 450 miles from the Court and his principal attorney, who conducted all the litigation, lived in Oklahoma City, Oklahoma, a distance over 350 miles from the Court. The numerous required appearances in Kansas City by both respondent and his attorney, occasioned in a large part by petitioner's failure to produce records and cooperate in preparation for trial, constituted and made this case a very expensive undertaking for respondent as was well known by petitioner. Petitioner was and is apparently well healed for money for litigation in this case. He was not only able to employ more than adequate representation for this adversary proceeding but for several years during the bankruptcy proceeding conducted through his attorneys a continuous stream of litigation concerning one aspect or another of this bankruptcy proceeding.

Petitioner states at page 8 of his petition that "petitioner emphatically denies this conclusion (Stafos himself

caused much of the delay—contained in Court of Appeals' opinion) and submits it is without support in the record; then attempts to explain away the record and berate the Bankruptcy Judges. Petitioner's argument is deceptive and absurd.

Petitioner's attorneys were all Kansas City, Kansas lawyers who practice regularly before the Bankruptcy Judges who conducted the bankruptcy proceedings and heard this case. If attorneys for petitioner had wanted this adversary proceeding set for trial expeditiously it would have been set for trial. Proof of this fact was shown by the events that transpired after petitioner employed William O. Isenhour, Jr. as additional counsel in March 1977. Petitioner decided at last to let the case be heard and Mr. Isenhour, his newly employed, learned, and very able trial attorney assisted in keeping the case on tract so that it was tried fully by the Court, Judge Franklin presiding, in a capable, orderly, and timely, manner in September 1977.

Bankruptcy Judge Sullivant tried to push the case to trial on several occasions and petitioner's then attorneys dragged their feet. Probably Judge Sullivant didn't push hard enough and undoubtedly part of the reason was his consideration for petitioner's attorneys due to his acquaintance and working relationship with them. Bankruptcy Judge Franklin was selected and appointed from the Kansas City, Kansas Bar in 1976. Both Judges are in the opinion of respondent outstanding Judges. Respondent submits that under the facts in this case it is unconscionable for petitioner to berate these Judges. Why doesn't he berate his attorneys? Why didn't he discharge them? The reason is his attorneys represented him and did the very best they knew how to obtain for him a discharge; and the best strategy appeared to be delay. Petitioner's berating of the Bankruptcy Judges now, is a

desparate, tongue-in-cheek effort to obtain a discharge to which he is not entitled. The "fresh start" philosophy underlying the Bankruptcy Act does not apply to a bankrupt who is not entitled to a discharge! Discharge in bankruptcy is a privilege which bankrupt is not entitled to unless he deserves it. *Re Stone,* 60 F. Supp. 703 (DC Mo. 1945); *United States v. Frardin,* 63 F. Supp. 271 (DC Md. 1946). The maximum "justice delayed is justice denied" could have application in this case only to the respondent.

Petitioner in his brief takes the high road in proclaiming the virtues of "the just, speedy, and inexpensive determination of every proceeding in bankruptcy" on which there can be no dissent. No person would suggest that this case was speedy or inexpensive. Whose fault? Another example of delay by petitioner is in connection with Requests for Admissions of respondent filed December 16, 1971. Response to these request for admissions was filed by petitioner on January 28, 1975. On another occasion petitioner obtained a court order delaying for several days the taking of his deposition on a technical matter in December 1971 after attorney for respondent had flown to Kansas City for purpose of taking his deposition. In his outline of the delay in this case petitioner omits and ignores all causes of delay and his statements relative to the facts are in some cases grossly inaccurate and misleading, as follows:

1. The delay in filing objections to discharge was entirely the fault of petitioner, and the Bankruptcy Court properly extended time for filing objections under 11 U.S.C. Section 32 (b)(1).

2. The first pretrial conference was scheduled 34 days after filing of objections to discharge. The second pretrial conference was scheduled April 20, 1972 during time petitioner was litigating the homestead question.

3. The first objections to discharge of respondent filed August 20, 1971 contained all the grounds and specifications on which the trial was conducted. The amendment in January 1975 to exclude respondent Bell's debt from discharge was dismissed by Judge Franklin.

4. Discovery was first closed in January 1972. Reopening for further discovery by the Court was allowed without prejudice to or delay of trial.

5. There was nothing noted in or on the financial statement issued by petitioner on February 15, 1967 for the year 1966, prepared by George W. Sinderson, or any testimony to indicate it was prepared other than on a cash basis the same as petitioner's 1966 income tax return.

6. Petitioner's charactization as an "ordinary farmer" in his petition does not comport with the facts. A man who has a PACA license and handles a million dollars a year worth of other persons' produce and operates trucks and trailers of a value that will allow forty to fifty thousand dollars a year depreciation is not an "ordinary farmer." A man who signs a U. S. Individual Income Tax Return one day with a statement of insolvency of over $100,000.00 in the red and the next day issues a financial statement for a credit rating showing he is worth $100,000.00 is not an "ordinary farmer." A man who loses his PACA license for failure to pay a reparation award and then works it out so his partner can obtain a PACA license and continue business under the same partnership name contrary to and in defiance of the law is not an "ordinary farmer". A man who can spend eleven years in expensive litigation with two attorneys representing him and take two appeals through the United States District Court, the Court of Appeals and two Petitions for Writ of Certiorari to the Supreme Court of the United States is no "ordinary farmer" or "ordinary bankrupt".

III.

The questions in the form presented in petitioner's petition and under the facts in this case are not meritorious. Certainly the questions are not of a broad, general, public importance under the Constitution and Laws of the United States so as to justify this Court's review by certiorari. Rule 17 of this Court limits review by writ of certiorari to the Court's sound judicial discretion and "only where there are special and important reasons therefor". The general rule re review by writ of certiorari to this court as set forth in numerous cases is as follows: Jurisdiction to review judgments and decrees of the court of appeals is to be exercised sparingly, and only in cases of gravity and general importance or in order to secure uniformity of decision. *State of Ohio v. Swift & Co.*, (1922) 260 U.S. 146, 43 S. Ct. 22; *Fields v. United States*, (1907) 205 U.S. 292, 27 S. Ct. 543; *In re Woods*, (1892) 143 U.S. 202, 12 S. Ct. 417; Ordinarily, application by Federal District Court of Rules of Civil Procedure, when affirmed by Court of Appeals, will not be reviewed by Supreme Court on certiorari. *Appalachian Power Co. v. American Institute of C.P.A.*, (1959) 361 U.S. 82, 80 S. Ct. 16.

CONCLUSION

Neither conflict, importance, nor appropriateness is presented by petitioner in his Petition for Writ of Certiorari. Left only with error to sustain his request for certiorari, respondent submits it should be denied. *Magnum Import Company v. De Spoturno Coty,* (1923) 262 U.S. 159, 43 S. Ct. 531.

Respectfully submitted,

HARLEY E. VENTERS
Suite 104 North Terrace
4545 N. Lincoln Blvd.
Oklahoma City, Oklahoma 73105
1-405-528-3344
Attorney for Respondent

Appendix

APPENDIX "A"

(Filed January 23, 1979)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
BANKRUPTCY DIVISION

Bankruptcy No. 21239-B-4

In the Matter of:
JAMES GEORGE STAFOS,
Bankrupt,

ROBERT D. BELL,
Plaintiff,

vs.

JAMES GEORGE STAFOS,
Defendant.

JOURNAL ENTRY AND JUDGMENT

On August 20, 1971, the plaintiff, Robert D. Bell, filed a complaint in the District of Kansas at Kansas City, Kansas, objecting to the discharge of defendant, James George Stafos, under sections 14c(1), 14c(2), 14c(3), 14c(4), 14c(6), and 14c(7) of the Bankruptcy Act [11 USCA §32(c)(1), (2), (3), (4), (6) and (7)]. On January 25, 1975, the plaintiff amended his complaint to include a count to determine dischargeability of debt under section 17a(2) of the Bankruptcy Act [11 USCA §35a(2)].

The plaintiff was represented by his attorneys, Harley E. Venters, of Oklahoma City, Oklahoma; and John J. Ziegelmeyer, of Kansas City, Kansas. The defendant was

represented by his attorneys, William O. Isenhour, Jr., of Mission, Kansas; and Thomas E. Joyce, of Kansas City, Kansas.

This matter came on for trial on September 13, 14 & 15, 1977. After hearing testimony of witnesses; statements of counsel; examining the exhibits, all pleadings and briefs submitted; and Findings of Fact and Conclusions of Law having been filed this day and by this reference incorporated as a part of this Order,

IT IS, BY THE COURT, DETERMINED AND ORDERED:

1. That the plaintiff's objections to discharge under sections 14c(1) and 14c(3) are sustained and the general discharge be and the same is hereby denied;

2. That the plaintiff's objections to discharge under sections 14c(2), 14c(4), 14c(6) and 14c(7) be and the same are hereby overruled and therefore, dismissed;

3. That the plaintiff's Complaint to determine dischargeability of debt under section 17a(2) of the Bankruptcy Act be and the same is hereby dismissed;

4. That the cost be and hereby is assessed against the defendant, James George Stafos; and

5. That this Journal Entry of said judgment be forthwith filed herein and the same is therefore effective as of this 23rd day of January, 1979.

/s/ Benjamin E. Franklin
Benjamin E. Franklin
Bankruptcy Judge